SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. 62

NORTHERN NATURAL GAS COMPANY,
Appellant,

v.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

APPELLANT'S BRIEF

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OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas, whose judgments of affirmance are under review in these appeals, are officially reported as to No. 42,128 in 188 Kan. 355, 362 P.2d 599 (R. 157, and also attached hereto as Appendix A), and as to No. 42,127 in 188 Kan. 351, 362 P.2d 609 (R. 36, and also attached hereto as Appendix D). Such Court's opinion denying rehearing in No. 42,128 is of-

ficially reported in 188 Kan. 624, 364 P.2d 668 (R. 187, and also attached hereto as Appendix B; the News Week article therein referred to being attached hereto as Appendix C). No opinion was rendered by that Court in denying rehearing in No. 42,127 (R. 44).

The state district court from which appeals in these cases were taken by appellant to the Supreme Court of Kansas did not render an opinion in either case. The judgment of affirmance of such district court in No. 42,128 can be found at R. 112. Similarly such district court's judgment of affirmance in No. 42,127 can be found at R. 26. The judgments sustained as valid certain Orders and a Rule of the State Corporation Commission of Kansas regulating the taking (purchasing) of natural gas in the "Kansas Hugoton Field", the operational effect of which was to control the sale therefrom of gas sold in interstate commerce for resale.

The Order of the State Corporation Commission that is the subject matter of the trial court's judgment of affirmance in No. 42,128 (R. 99), is not supported by Commission opinion, but the same, including the findings of such Commission, is attached hereto as Appendix E. The Order and Rule issued by the State Corporation Commission that is the subject matter of the trial court's judgment of affirmance in No. 42,127 (R. 14), is also not supported by Commission opinion, but similarly the same, including the findings of such Commission, is attached hereto as Appendix F.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas in No. 42,128 was entered by that Court June 10, 1961 (R. 157). On August 31, 1961, appellant's motion for

rehearing therein (R. 175) was denied by official opinion and such judgment thereupon became final (R. 187). The judgment of the Supreme Court of the State of Kansas in No. 42,127 was entered by that Court June 10, 1961 (R. 36), and relies therein on that Court's opinion in No. 42,128 for a development of the facts and reasoning of its decision. On September 19, 1961, appellant's motion for rehearing therein (R. 42) was denied without opinion, and such judgment thereupon became final (R. 44). Within the time prescribed by 63 Stat. 104, 28 U.S.C.A. 2101 (c), appellant, on November 17, 1961, duly filed in No. 42,128 and No. 42,127, with the Clerk of the Supreme Court of Kansas, its notice of appeal to this Court with proper proof of service thereof (R. 44, 189). (Rules 10 and 11 of this Court.)

The jurisdiction of this Court to review each of such final judgments and decisions of the Supreme Court of Kansas by direct appeal is authorized by 62 Stat. 929, 28 U.S.C.A. 1257(2), and is supported by the decisions of this Court, including, among others:

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794.

Natural Gas Pipe Line Co. v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576.

Cities Service Gas Co. v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381.

On May 28, 1962, this Court entered its order noting probable jurisdiction in each of these cases which have been docketed herein as one appeal. ..... U.S. ....., 8 L. Ed. 2d 399, 82 S. Ct. 1248.

QUESTION PRESENTED

Does the State of Kansas have jurisdiction, under the guise of regulating production and in the face of the provisions of the Natural Gas Act and Federal Power Commission regulations thereunder, to control the sale of natural gas in interstate commerce for resale after the production and gathering thereof has ended, by directing a natural gas company purchaser, operating under subsisting gas sales contracts with its producers, to make its purchases in a manner or at a rate contrary to such contracts which are on file with the Federal Power Commission as effective rate schedules and on which certificates of public convenience and necessity authorizing such sales have been issued?

STATUTES INVOLVED

In No. 42,128 in the Supreme Court of the State of Kansas the order of the Corporation Commission of that State under review by that Court was dated October 7, 1959, and in material substance provided:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field." (R. 101).

The contents of said Order are set forth in full in Appendix E hereto.

In No. 42,127 in the Supreme Court of the State of Kansas the Order and Rule of the Corporation Commission of that State under review by that Court was issued effective February 8, 1960, and in material substance provided:

"Rule 82-2-219

"Ratable Production of Gas from Common Source of Supply

"In each common source of supply under proration by this Commission, *each purchaser shall take gas* in proportion to the allowables *from all the wells to which it is connected* and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S., 1959 Supp., 55-703; Effective February 8, 1960)." (Emphasis added.) (R. 17-18).

The contents of said Order and Rule are set forth in full in Appendix F hereto.

In Kansas such orders and rules have the force and effect of a state statute. *Stratton* v. *Atchison, T. & S. F. Rly. Co.*, 118 Kan. 673, 236 Pac. 831; *White Eagle Oil Co.* v. *State Corporation Comm.*, 168 Kan. 548, 549, 214 P.2d 337.

The Kansas statute, G.S., 1959 Supp., 55-703, that was in effect at the time such Orders and Rule were issued and upon which the same are based provides:

"Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce

natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: *Provided, however*, That the daily takes of gas from any well in an unprorated gas pool shall not exceed twenty-five percent (25%) of its open flow: *Provided further, however*, That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells thereir is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand (G.S. 1949, § 55-703; L. 1959, ch. 237, § 1; June 30)."

Federal statutory provisions and regulations together with the United States Constitutional provision upon which appellant relies for a reversal of the judgments on appeal herein are:

The provisions of the Natural Gas Act, 52 Stat. 821 through 833, as amended [15 U.S.C.A. 717 and 717a through 717w, as amended], particularly: Sections 1, 4, 5, 7, 16 attached hereto as Appendix G. The following Federal Power Commission rules and regulations, 18 C.F.R., Sec. 154.91 (a) (1) and (b), and 154.92 (a) and (b), 154.93, 154.94 (a), 154.97; 18 C.F.R. 157.5 (a), (b), (c), 157.23 (b) and 157.30 attached hereto as Appendix H.

Clause 2 of Article VI of the United States Constitution, which reads:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT

Appellant, Northern Natural Gas Company, hereinafter for convenience called Northern, is a corporation engaged in the business of purchasing natural gas for transportation and sale in interstate commerce for resale for ultimate public consumption and is, therefore, a "natural-gas company" as defined in the Natural Gas Act, 52 Stat. 821, 15 U.S.C.A. 717a (R. 18, 19).

The "Hugoton Gas Field" encompasses and constitutes a single interstate common source of supply of natural gas

and lies, in its entirety, within the States of Kansas, Oklahoma and Texas. It is said to be one of the largest reservoirs of natural gas in the world. The largest portion of the field is located in Kansas. This portion of such common source of supply is commonly known as the "Kansas Hugoton Field". That portion in Oklahoma is called the "Guymon Hugoton Field", and that part of the field in Texas is designated as the "Texas Hugoton Field". *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 724, 222 P.2d 704; *Interstate Oil Compact Quarterly Bulletin*, Volume XI, December, 1952, Nos. 3 and 4, page 12; and *Conservation of Oil and Gas*, 1948, by Mineral Law Section of the American Bar Association, 165-183, 403-408.

While the "Hugoton Gas Field" comprises but one single common source of supply of natural gas, the production of natural gas in the portion of the field lying in Texas is regulated by the Railroad Commission of that State. Article 6008, *Vernon's Annotated Texas Civil Statutes*, 10 through 22; and Articles 6008a-2, 6049c-7 and 6049d-4. Production in that part of the field within the State of Oklahoma is regulated by the Corporation Commission of that State. *52 O.S.A.*, Sections 21 through 35, 231 through 233, and 236 through 247. The largest portion of the field is in Kansas and the production therefrom is regulated by the Corporation Commission of the State of Kansas, under the provisions of G.S. 1949, 55-701 through 55-713, and G.S., 1961 Supp., 55-703, 55-706, and 55-711, being amendments thereto in effect at all times material herein Under the rule laid down by this Court in *United States* v. *Louisiana*, 363 U.S. 1, 33, 4 L. Ed. 2d 1025, 80 S. Ct. 961, the jurisdiction of such respective States of the "Hugoton Field" is limited to that portion of the field which is located within boundaries of each State.

Northern, as a "natural-gas company" purchases gas to supply its interstate markets from various common sources of supply both within and outside of Kansas. *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708; *J. M. Huber Corporation* v. *Federal Power Commission* (C.A. 3), 236 F.2d 550, 552-553. The "Kansas Hugoton Field" has been one of Northern's most important sources of gas supply from the formation of the company to the present time (R. 69). The initial contract for Northern's gas supply in such field was dated May 27, 1930, and executed by predecessors in interest of Northern and Republic Natural Gas Company, for convenience referred to hereafter as Republic. On December 21, 1945, Northern and Republic entered into a new contract hereinafter referred to as the Republic "A" Contract (or as Republic's F.P.C. filed Rate Schedule) which contract superseded the original contract and previous amendments thereto. This contract, as subsequently amended, covers the sale of gas by Republic to Northern from approximately 144 gas wells in the "Kansas Hugoton Field" (R. 69-70).

Under the Republic "A" Contract, as amended, as under the initial 1930 contract, certain maximum and minimum quantities of gas were specified for sale and purchase between the parties (R. 70-73). The Kansas Supreme Court, in the case of *Northern Natural Gas Company* v. *Republic Natural Gas Company*, 172 Kan. 450, 241 P.2d 708, issued March 8, 1952 (decided more than two years prior to issuance of the Federal Power Commission series of orders 174, regulating producers of gas and requiring certification of sales and service to be rendered pursuant to such Republic "A" Contract), determined that Northern should regulate its purchases from the Republic "A" wells so that at the end of each contract accounting year it would

have purchased therefrom the volume of gas Republic is entitled to produce and deliver to Northern under valid subsisting orders of the Corporation Commission of Kansas for that particular year. Such volumes will hereafter be referred to as the "legal allowables" of the Republic "A" wells. Since said court decision Northern has endeavored to purchase from the Republic "A" wells during each such contract year the volumes of gas they were legally entitled to produce (R. 74-75).

Beginning in 1938 Northern contracted to buy additional gas supply in the "Kansas Hugoton Field" from various other producers. It currently has in effect about 125 gas purchase contracts with producers in said field under which approximately 1,100 wells have been connected to Northern's pipeline therein (R. 75-76). All of such contracts were required to be filed as rate schedules with the Federal Power Commission (18 C.F.R. 154.91 (a) (1) and 154.92 (a)) and provide that Northern shall purchase gas ratably from the wells covered thereby with all other wells in said field except the Republic "A" wells. Such contracts specifically exempt the volume of gas Northern is obligated to purchase from the Republic "A" wells in determining Northern's contract duty to purchase ratably from the wells in the field connected to it (R. 76-78).

From March, 1944, the date of the promulgation of the Basic Proration Order for the "Kansas Hugoton Field" (R. 47-66), until 1958, there was no important difference between Northern's purchases from the Republic "A" wells and other wells connected to its system in that field. Its purchases from all wells to which it was connected in the field were substantially ratable over reasonable periods of time (R. 78-84). In the spring of 1958, however, a material difference developed with respect to such ratability. Such difference resulted from two factors. First, the Corporation

Commission of Kansas, hereinafter for convenience called Kansas Commission, by its market demand orders, had, since 1956, granted allowables to the wells in the "Kansas Hugoton Field" of approximately 130 billion cubic feet in excess of the total field production therein (R. 84). Secondly, Northern had been seriously delayed in expanding its system to new markets by the failure to timely receive the necessary certificates of public convenience and necessity from the Federal Power Commission (R. 85). Since Northern was obligated to and did purchase the "legal allowables" from the Republic "A" wells, the action of the Kansas Commission in fixing the high allowables, plus the inability of Northern to connect anticipated new markets, resulted in substantial underproduction accruing to wells other than the Republic "A" wells connected to Northern's interstate pipe line system in the "Kansas Hugoton Field" (R. 85, 87).

On May 27, 1959, the Kansas Commission issued an order requiring Northern to show cause why it should not "take" (purchase) gas ratably from all wells to which it was connected in the "Kansas Hugoton Field" (R. 66). After conclusion of the hearing on said show cause order, the Kansas Commission issued its Order dated October 7, 1959, the subject matter of review in case No. 42,128 in the Supreme Court of Kansas, whereby Northern was directed and required to purchase gas ratably from all of such wells connected to its interstate system in said field (R. 99, App. E). While this Order was subsequently rescinded by the Kansas Commission on February 8, 1960 (R. 110, 111), it was affirmed as valid by the Supreme Court of Kansas (R. 157).

On November 12, 1959, the Kansas Commission initiated proceedings for the adoption of a rule to require all purchasing companies to purchase gas ratably from all wells to which they are connected in each common source of

supply including the "Kansas Hugoton Field"; in the State of Kansas (R. 2). There are interstate pipe line purchasers other than Northern in said field. Cf. *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 222 P.2d 704; *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P.2d 528, reversed 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381. The record before the Kansas Commission that appears in case No. 42,128 in the Supreme Court of Kansas was incorporated into this proceeding, the review of which was designated Case No. 42,127 in the Supreme Court of Kansas (R. 4, 5). After further hearings the Kansas Commission on February 3, 1960, issued its Order promulgating Rule 82-2-219 requiring each purchaser in any common source of supply under proration to "take" (*i. e.*, purchase) gas from all wells to which it is connected in proportion to the allowables thereof and to maintain all such wells in substantially the same proportionate status as to overproduction and underproduction (R. 17, App. F).

Within the time authorized by statute, appellant duly filed petitions with the Corporation Commission for a rehearing of each of said Orders and Rule (R. 18, 101). In each of such petitions for rehearing (R. 20, 21, 103, 102) appellant raised, among others, the same federal question here asserted. On February 18, 1960, and November 10, 1959, the Kansas Commission denied appellant's petitions for rehearing (R. 21; 105).

Within the time prescribed by said Kansas statutes, appellant instituted its respective judicial review actions in the District Court of Finney County, Kansas, raising, among other questions, the same federal question here asserted (R. 24; 107). The cases were heard by the Finney County District Court which entered its respective judg-

ments affirming the validity of each of said Orders and Rule (R. 26; 112).

Thereafter appellant appealed each of said Finney County District Court's judgments to the Supreme Court of Kansas. In due course that Court affirmed each such judgment, and the decision of the Supreme Court of Kansas in each of such cases is now before this Court for review based on the same federal question hereinbefore set forth. That question the Supreme Court of Kansas has decided adversely to appellant.

SUMMARY OF ARGUMENT

Northern Natural Gas Company is an interstate pipeline company engaged in the purchase of natural gas for transportation and resale in interstate commerce, and accordingly is a "natural-gas company" subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. Northern, as a "natural-gas company" purchases gas to supply its interstate markets from various common sources of supply both within and outside of Kansas. The Kansas portion of the Hugoton Gas Field (which field in important parts lies also in the States of Oklahoma and Texas) is a source of gas supply for several interstate gas pipeline companies including Northern. Northern has approximately 125 gas sales contracts with independent producers covering purchases of gas by it in the Kansas portion of the Hugoton Gas Field. Each of such gas sales contracts has been filed with and accepted by the Federal Power Commission as an independent producer rate schedule and a certificate of public convenience and necessity has been granted with respect thereto. One of such contracts, with Republic Natural Gas Company (Republic's F.P.C. Rate Schedule), contains a minimum purchase provision while

all of the other gas sales contracts were, with respect to ratable purchases by Northern, made subject to such minimum purchase provision.

In October, 1959, the State Corporation Commission of the State of Kansas entered an Order addressed to Northern as a purchaser, requiring it to purchase gas ratably from the wells of all producers connected to Northern's lines in the Kansas Hugoton Gas Field. In February, 1960, such Kansas Commission rescinded its October, 1959, Order, and by Order issued a Rule requiring all of the purchasing pipeline companies to "take" (purchase) gas ratably from all wells connected to their respective pipe line systems in each common source of supply. Neither of such Orders nor the Rule were in any manner directed to producers or to the business of production but were rather addressed solely to the purchasers of such gas; this, notwithstanding the fact that such sales by such producers to Northern, being in interstate commerce for resale, were subject to the exclusive jurisdiction of the Federal Power Commission.

Northern's market demands (requirements) for gas from the Kansas Hugoton Field were not sufficient to permit it to purchase the minimum volumes of gas required under the Republic Rate Schedule and at the same time purchase ratably from the wells under all of the other producers' rate schedules covering sales of gas in such field to it. It therefore was required to choose between (a) obeying the Kansas Commission's Orders and Rule and thereby subjecting itself to potential liability under the Republic Rate Schedule or (b) not obeying the Orders and Rule and thereby subjecting itself to statutory penalties provided under Kansas law. Northern chose the former course pending determination of the validity of said Orders and Rule.

The issue herein is whether, in view of the provisions of the Natural Gas Act, the Orders and Rule complained of are within the regulatory authority of the Federal Power Commission under its mandate to regulate the "transportation or sale" of natural gas in interstate commerce for resale, or within the power of the State to regulate under the "production or gathering" exemption of said Act.

In 1938 the Congress enacted the Natural Gas Act (15 U.S.C.A. 717 *et seq.*), thereby evidencing an intent to create a "comprehensive and effective regulatory scheme" with regard to the business of transporting and selling for resale natural gas for ultimate distribution to the public in interstate commerce. *Panhandle E. Pipe Line Co. v. Public Serv. Com.*, 332 U.S. 507, 520, 92 L. Ed. 128, 68 S. Ct. 190, 197. Congress having entered such field, the Supremacy Clause of the Federal Constitution controls. *Free v. Bland*, U.S. , 8 L. Ed. 2d 180, 183, 82 S. Ct. 1092, 1093. In 1954 this Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682, 684, 98 L. Ed. 1035, 74 S. Ct. 794, 799, 800, determined that it was within the Federal Power Commission's authority and duty to regulate sales of natural gas in interstate commerce for resale under the Natural Gas Act "at both ends of the interstate transmission systems."

In outlining the jurisdiction of the Federal Power Commission in the performance of its obligation to determine what certificates authorizing sales and service should be granted to natural-gas companies (both independent producers and interstate pipe line companies) this Court in *Atlantic Ref. Co. v. Pub. Ser. Com. of New York*, 360 U.S. 378, 3 L. Ed. 2d 1312, 1320, 79 S. Ct. 1246, amendment denied 361 U.S. 801, 4 L. Ed. 2d 53, 80 S. Ct. 42, held that rates (prices) are not the only factor bearing on the public convenience and necessity; in *Sunray Mid-Continent Oil*

Co. v. *F.P.C.*, 364 U.S. 137, 4 L. Ed. 2d 1623, 80 S. Ct. 1392, rehearing denied 364 U.S. 856, 5 L. Ed. 2d 80, 81 S. Ct. 32, as well as in *Sun Oil Company* v. *Federal Power Commission*, 364 U.S. 170, 4 L. Ed. 2d 1639, 80 S. Ct. 1388, rehearing denied 364 U.S. 856, 5 L. Ed. 2d 80, 81 S. Ct. 32, held that, irrespective of private contract provisions limiting the duration of the sales and service of gas sold in interstate commerce for resale covered by such contract, the Federal Power Commission alone has the jurisdiction to determine when and if it is in the public interest to abandon service; in *F.P.C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 5 L. Ed. 2d 377, 81 S. Ct. 435, held that the Federal Power Commission must evaluate *all* features bearing on public interest in determining whether to grant natural gas certificates of public convenience and necessity.

The Kansas Orders and Rule herein are invalid since they attempt to regulate the sale of gas in interstate commerce for resale in violation of the Natural Gas Act. They do not regulate the production of gas since production has ended at the point the purchaser takes (*i. e.*, purchases) gas from the producer. Production is "the act of bringing forth gas from the earth." *Saturn Oil & Gas Company* v. *Federal Power Com'n.*, (C.A. 10) 250 F.2d 61, cert. den. 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542. Northern is not a producer of gas in Kansas (R. 19). Under Republic's Rate Schedule gas is purchased by Northern at the point of delivery which is designated as the point at which Northern's pipelines connect to Republic's facilities at the wellhead (R. 143-144). At such point production has been completed and the sale of the gas is subject to the exclusive regulation of the Federal Power Commission. *Continental Oil Company* v. *Federal Power Commission*, (C.A. 5) 266 F.2d 208.

No State can, under the guise of a purported ratable take order or rule, compel a natural gas pipe line company which is subject to the jurisdiction of the Federal Power Commission to purchase gas within such State in volumes contrary to the requirements of its gas purchase contracts which have been filed as rate schedules with and certificated for sales and service by the Federal Power Commission. Natural Gas Act, Sections 4 and 7. This is a matter of national, rather than local concern since the subject sales are interstate in nature. Accordingly, only the Federal Power Commission has jurisdiction to determine what is in the public interest.

On the facts here involved and the effect of the Orders and Rule of the Kansas Commission, the decisions of the Supreme Court of Kansas upholding the validity of the Kansas Commission's Orders and Rule should be reversed, just as this court, in 1958, reversed the judgment of the Kansas Supreme Court in the minimum price case. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381.

ARGUMENT

I

The Natural Gas Act Grants to the Federal Power Commission Exclusive Jurisdiction to Regulate All Aspects of the Sale of Natural Gas in Interstate Commerce for Resale.

The necessity for federal regulation under the Natural Gas Act was made perfectly plain by the Congress of the United States when at the outset of the Act it specifically declared:

> "* * * that the business of transporting and selling natural gas for ultimate distribution to the

public is affected with a public interest, *and that federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate * * * commerce is necessary in the public interest.*" (Emphasis added). 52 Stat. 821, 15 U.S.C.A. 717 (a).

No less plain and understandable is the language of Section 1 (b) of said Act:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, * * *." 52 Stat. 821, 15 U.S.C.A. 717 (b).

Congress in enacting the provisions of the Natural Gas Act evidenced an intent "to create a comprehensive and effective regulatory scheme". *Panhandle E. Pipe Line Co. v. Public Serv. Com.*, 332 U.S. 507, 520, 92 L. Ed. 128, 68 S. Ct. 190, 197. Whatever may be the announced intention in the promulgation of the Kansas Orders and Rule complained of, if they conflict with the federal law they must yield thereto. This Court on May 21, 1962, in *Free v. Bland*, ... U.S. ....., 8 L. Ed. 2d 180, 183, 82 S. Ct. 1092, 1093, said:

> "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article 6, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield. Gibbons v. Ogden (U.S.) 9 Wheat 1, 210, 211, 6 L. Ed. 23, 73. See Franklin Nat. Bank v. New York, 347 U.S. 373, 98 L. Ed. 767, 74 S. Ct. 550; Wissner v. Wissner, 338 U.S. 655, 94 L. Ed.

424, 70 S. Ct. 398; Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 87 L. Ed. 165, 63 S. Ct. 172. Thus our inquiry is directed toward whether there is a valid federal law, and if so, whether there is a conflict with state law."

To that end Congress specifically charged the Federal Power Commission with the responsibility of regulating under the Natural Gas Act and especially Sections 1, 4, 5, 7 and 16 as pertinent herein, the transportation and sale in interstate commerce of natural gas for resale for ultimate public consumption, and natural gas companies engaged in such transportation or sale while, at the same time, leaving to the states certain areas of responsibility, such as the drilling and spacing of wells and the like.[1]

One of the questions presented by these appeals is whether the State of Kansas has jurisdiction, in the face of the provisions of the Natural Gas Act and the Federal Power Commission regulations thereunder, to require a "natural-gas company" purchaser to increase its purchases of gas within Kansas for transportation and resale in interstate commerce by directing such company to make its purchases in a manner or at a rate contrary to the Federal Power Commission's Gas Rate Schedules covering sales of gas to it. Producers' gas sales contracts, under applicable

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1. *Colorado Interstate Gas Co. v. Federal P. Com.*, 324 U.S. 581, 602-603, 89 L. Ed. 1206, 65 S. Ct. 829. Similarly, a state may determine common sources of supply of oil and gas, require production separately from separate producing formations found within the common well bore, and restrict the commingling of production therefrom; restrict the production from developed leases for purposes of conservation and protection of correlative rights, provide means for proper measurement of production, require well completion in such a manner as to protect fresh water strata and prevent the introduction of salt water into producing formations, control secondary methods of recovery, waterflooding, etc.

rules and regulations of the Federal Power Commission, are filed as gas rate schedules. See *Sun Oil Company* v. *Federal Power Commission*, 364 U.S. 170, 4 L. Ed. 2d 1639, 80 S. Ct. 1388, rehearing denied 364 U.S. 856, 5 L. Ed. 2d 80, 81 S. Ct. 32.

To *assure* adequate service to ultimate consumers in the interstate markets of the respective gas pipe line companies, the Federal Power Commission has jurisdiction to regulate sales, supply and service at the end of interstate transmission. *Michigan Consolidated Gas Co.* v. *Federal Power Com'n*, (App. D.C.) 283 F.2d 204, cert. denied 364 U.S. 913, 5 L. Ed. 2d 227, 81 S. Ct. 276. As this Court has said, to be effective such jurisdiction must apply to sales, supply and service at the *source* of such gas sales. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794.

Of course it is clear from the very face of both the Orders and the Rule issued by the Kansas Commission in these appeals that they constitute a regulation of such sales. The October 7, 1959 Order ordered Northern to "take gas ratably from all wells"; the Rule effective February 8, 1960, ordered each purchaser (to) "take gas in proportion to the allowables from all the wells to which it is connected." Both the Kansas Commission and the Kansas Supreme Court (R. 163) defined "purchaser" as "taker". But, it is manifest that the very idea of "purchase" imports a "sale". A purchase occurs whenever a sale is effected. *Nicol* v. *Ames*, 173 U.S. 509, 532, 43 L. Ed. 786, 19 S. Ct. 522, 528. Accordingly it is clear that the Orders and Rule complained of here are, in fact and in law, regulations of sales.

From 1954 to date, the decisions of this Court and all other federal courts have clearly indicated that the area of activity attempted to be regulated by the State of

Kansas herein is subject to the exclusive jurisdiction of the Federal Power Commission and that the State is powerless to enforce its edicts with respect thereto. On June 7, 1954, this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682-684, 98 L. Ed. 1035, 74 S. Ct. 794, 799, 800, said with respect to the Federal Power Commission's authority to regulate "sales" of natural gas in interstate commerce for resale under the Natural Gas Act:

> "* * * we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company. * * * *Thus, we are satisfied that Congress sought to regulate wholesales of natural gas occurring* at both ends of the interstate transmission systems." (Emphasis added.)

Mr. Justice Frankfurter, in his concurring opinion, interpreted the purpose of the Natural Gas Act by using this language:

> "However, since sales for resale, or so-called 'wholesales', in interstate commerce are not local in character and are constitutionally not subject to State regulation (see Missouri v. Kansas Gas Co., 265 U.S. 298, and Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83), the basic purpose of the legislation is to occupy this field in which the States may not act." (347 U.S. 672, at 686)

Again in 1955 in *Natural Gas Pipe Line Co.* v. *Panoma Corp.*, 349 U.S. 44, 45, 99 L. Ed. 866, 75 S. Ct. 576, this Court, referring to the question whether Oklahoma could regulate the price to be paid for natural gas after its production and gathering had ended, by a company which transports the gas for resale in interstate commerce, said:

> "* * * We held in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794, that such a sale and transportation cannot be *regulated* by a state but are subject to the *exclusive regulation* of the Federal Power Commission." (Emphasis added.)

In 1958, this Court reversed the decisions of the Oklahoma and Kansas Supreme Courts, holding again that a state had no authority to regulate the price of natural gas sold in interstate commerce for resale even though such sale occurred at or near the wellhead of the producers' wells. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381; *Phillips Petroleum Co.* v. *Corporation Commission of the State of Oklahoma*, 355 U.S. 425, 2 L. Ed. 2d 412, 78 S. Ct. 409, 410.

15 U.S.C.A. 717 (a), 52 Stat. 821, specifically declares:

> "* * * that *Federal regulation* in matters relating to the transportation of natural gas and the *sale thereof in interstate and foreign commerce is necessary in the public interest.*" (Emphasis added.)

In the face of these recent easily understood decisions of this Court, the Supreme Court of Kansas, in these appeals now before the Court, erroneously concluded:

> "As above noted, we are quite well aware that Northern is engaged in the transportation and sale of natural gas in interstate commerce by pipe line. We do not believe, however, that the matters dealt with in this case affect interstate transportation or sale in any respect. That is, the matters dealt with in this case pertain to 'production and gathering of natural gas'. (15 U.S.C.A., Sec. 717 (b))" *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. 355, 361, 362 P.2d 599 (R. 157, 165).

This quoted language of the Supreme Court of Kansas contains the same faulty reasoning used by that Court in

sustaining the validity of the gas price fixing order of the same Commission, which this Court reversed in a one sentence per curiam opinion in *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381.

In 1961, in the case of *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1, 19, 20, 5 L. Ed. 2d 377, 390, 81 S. Ct. 435, in interpreting the Natural Gas Act with respect to the jurisdiction of the Federal Power Commission thereunder as opposed to possible state regulatory authority, this Court said:

> "• • • Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. Compare Guss v. Utah Labor Relations Board, 353 U.S. 1, 1 L. Ed. 2d 601, 77 S. Ct. 598, 609. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs."

In view of this Court's explicit holding in the *Natural Gas Pipeline Co.* case, *supra*, that the Federal Power Commission has exclusive jurisdiction to regulate "a sale and transportation," the "no man's land" of regulatory authority has been occupied and the question has already been resolved contrary to the holding of the Kansas Supreme Court in these cases.

If the Kansas Supreme Court had examined the decisions construing 15 U.S.C.A., Sec. 717 (b), it would have easily ascertained that the matters dealt with in these appeals *do not* pertain to the production or gathering of

natural gas. In no less than six cases[2] the courts have said that the production and gathering exemption applies only to the physical activities, facilities and properties used in the production and gathering of natural gas. When a sale in interstate commerce for resale is being made, the exemption *cannot* apply. This conclusion has never been more succinctly stated than in the opinion of the District Court in *Federal Power Commission* v. *J. M. Huber Corporation*, 133 F. Supp. 479, 482, fn. 3:

> "In short, as the words are used in Section 1 (b) a sale in interstate commerce for resale can never be part of the producing and gathering process."

Lower federal courts have had numerous occasions to apply the law enunciated by this Court in the above cited decisions. As expected, all of such courts have uniformly held that the Federal Power Commission has exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. They have likewise consistently held that, where such a sale is involved, the "production or gathering" exemption of 15 U.S.C.A. 717 (b) does not oust the Federal Power Commission of jurisdiction to regulate such sales. See, *e. g.*, *Federal Power Commission* v. *J. M. Huber Corporation*, 133 F. Supp. 479; *J. M. Huber Corporation* v. *Federal Power Commission*, (C.A. 3) 236 F.2d 550; *Deep South Oil Co. of Texas* v. *Federal Power Com'n*, (C.A. 5) 247 F.2d 882; *Saturn Oil & Gas Company*

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2. *Colorado Interstate Gas Co.* v. *Federal P. Com.*, 324 U.S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; *Interstate N. G. Co.* v. *Federal Power Com.*, 331 U.S. 682, 91 L. Ed. 1742, 67 S. Ct. 1482; *Federal Power Commission* v. *Panhandle E.P.L. Co.*, 337 U.S. 498, 93 L. Ed. 1499, 69 S. Ct. 1251; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794; *Deep South Oil Co. of Texas* v. *Federal Power Com'n*, (C.A. 5) 247 F.2d 882; *Saturn Oil & Gas Company* v. *Federal Power Com'n*, (C.A. 10) 250 F.2d 61, cert. denied 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542.

v. *Federal Power Com'n*, (C.A. 10) 250 F.2d 61, cert. den. 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542; *Continental Oil Company* v. *Federal Power Commission*, (C.A. 5) 266 F.2d 208.

Demonstrating the intent of Congress to "create a comprehensive and effective regulatory scheme" in enacting the Natural Gas Act (*Panhandle E. Pipe Line Co.* v. *Public Serv. Com.*, 332 U.S. 507, 520, 92 L. Ed. 128, 68 S. Ct. 190) are a series of cases both in this Court and in lower courts. In *Atlantic Ref. Co.* v. *Pub. Serv. Com. of New York* (1959), 360 U.S. 378, 3 L. Ed. 2d 1312, 79 S. Ct. 1246, amendment denied 361 U.S. 801, 4 L. Ed. 2d 53, 80 S. Ct. 42, this Court held that the duty imposed upon the Federal Power Commission by the Natural Gas Act with respect to the certification of sales and service requires it to ascertain if the proposal is fully supported by evidence showing it to be in the present or future public convenience or necessity, and that the rates or prices at which such sale is proposed to be made are not the only factor bearing on the public convenience and necessity. In the case of *Panhandle Eastern Pipe Line Co.* v. *Federal Power Com'n*, (C.A. 3) 232 F.2d 467, cert. den. 352 U.S. 891, 1 L. Ed. 2d 86, 77 S. Ct. 129, the court held in general that when Congress gave the Federal Power Commission control over the transportation of interstate natural gas, that necessarily included control of functioning of pipeline facilities, and since these are limited, new services are subject to Commission authority. It was held in *Sunray Mid-Continent Oil Co.* v. *F.P.C.* (1960), 364 U.S. 137, 4 L. Ed. 2d 1623, 80 S. Ct. 1392, reh. den. 364 U.S. 856, 5 L. Ed. 2d 80, 81 S. Ct. 32, that irrespective of private contract provisions limiting the duration of the sales and service covered by such contract the Federal Power Commission alone had the jurisdiction to determine when and if it was in the public

interest to abandon service. See Section 7 of the Natural Gas Act, and particularly subparagraph (b) thereof (15 U.S.C.A. 717 (f)). Although the physical activities, facilities and properties used in the production and gathering of natural gas may be exempt from jurisdiction of the Federal Power Commission under the Natural Gas Act, the moment there is a sale, as there is here, in interstate commerce for resale that exemption ceases to apply. *Saturn Oil & Gas Co.* v. *Federal Power Commission,* (C.A. 10) 250 F.2d 61, cert. den. 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542.

The Kansas Supreme Court's conclusion that the Federal Power Commission's jurisdiction over sales of gas in interstate commerce for resale only applies to price is clearly erroneous. If that were true, then Congress in passing the Natural Gas Act failed "to create a comprehensive and effective regulatory scheme".

If the Federal Power Commission is to exercise jurisdiction over an interstate pipe line's facilities and sales at the sales end thereof, it is necessary that it exercise jurisdiction over the volumes of gas sold to each company at the purchase end in the field. Compare *Saturn Oil & Gas Co.* v. *Federal Power Commission, supra.* This is consistent with the rationale of *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794, that if the Federal Power Commission is to exercise its jurisdiction as to the price at which such an interstate pipe line sells its gas such Commission must exercise its jurisdiction over the price at which such gas is sold to such interstate pipe line. Clearly the jurisdiction of the Federal Power Commission cannot be defeated by state regulatory action as here involved.

The all-inclusive jurisdiction of the Federal Power Commission over gas sales contracts between natural gas

companies and services to be rendered thereunder includes the exclusive jurisdiction to modify the terms thereof relating to services, thereby assuring protection of the consuming markets (15 U.S.C.A. 717 (c)).

Clearly, the Kansas Commission actions were in violation of the provisions of the Natural Gas Act and in contravention of the decisions of this Court construing the same, which determined that the exclusive jurisdiction to regulate such a sale in all its aspects is lodged in the Federal Power Commission.

II

The Kansas Orders and Rule Complained of Do Not Effectuate a Legitimate State Policy and the Operative Effect Thereof Is to Regulate the Sales of Gas in Interstate Commerce for Resale in Violation of the Natural Gas Act.

That both Orders and Rule are leveled directly at Northern, there can be no doubt, irrespective of the fact that the Rule itself is cast in general terms (R. 14). The Kansas Commission was well aware of Northern's contractual obligations to Republic Natural Gas Company. Evidence and testimony fully expository thereof were considered by the Kansas Commission in promulgating its Order directed to Northern dated October 7, 1959. The record in such proceeding was incorporated in full in the docket in which the Kansas Commission promulgated its Rule effective February 8, 1960, and rescinded the earlier Order (R. 5).

The Kansas Commission had granted allowables to the Kansas Hugoton Gas Field in excess of total field production by approximately 130 billion cubic feet and the wells in such field connected to Northern, other than the said Republic "A" wells, were substantially underproduced.

because Northern simply did not have the market requirements for gas from such field to permit it to purchase and receive the amount of gas from this field that the Kansas Commission had demanded[3] (R. 87-88).

Armed with the knowledge that Northern was obligated to purchase and receive under the Republic "A" contract (Republic F.P.C. Rate Schedule) the legal allowables from the Republic "A" wells (*Northern Natural Gas Company* v. *Republic Natural Gas Company*, 172 Kan. 450, 241 P.2d 708), the Kansas Commission thought it saw an opportunity to force Northern to purchase for its interstate pipe line system increased sales volumes of gas from the Kansas portion of the Hugoton Field by requiring it to purchase ratably among all the wells in the field to its system connected, but requiring Republic to do nothing. This exposed Northern to heavy penalty under the Kansas statute if it did not comply with such purported ratable take Orders and Rule. G.S. 1949, 55-708, 709 and 710.

On the other hand if Northern did obey such Orders and Rule, which it has done, it ran the hazards of threatened suits by Republic against it for money in substantial amounts (running into millions of dollars) for alleged breach of contract, since Northern's market requirements for gas from such field were not sufficient to enable it to purchase the Kansas Commission fixed allowables from the wells under the Republic "A" contract and also the Kansas Commission fixed allowables under its other 125 gas purchase contracts in said field. As a matter of fact such threatened litigation by Republic against Northern

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3. The validity of such Kansas Commission orders is being contested in numerous cases docketed and pending in the Supreme Court of Kansas, including those numbered 41515, 41516, 41555, and 41556.

did materialize after Northern had started complying with such Orders and Rule.[4]

While it is Northern's position that in event the challenged regulations should herein be determined to be valid, necessarily the contract obligations would have to yield thereto, the Kansas Commission would appear to have taken a contrary position in its Order dated October 7, 1959 (R. 99-101). Now it has seemingly reversed its position again in its Motion to Dismiss at pages 16 and 17 thereof.

It was necessarily clear to the Kansas Commission that the only way Northern could comply with the challenged Orders and Rule and thereby avoid the imposition of statutory penalties—and at the same time avoid the hazards of possible law suits by Republic for alleged breach of contract—was to increase its purchases from all the other wells connected to it in the Kansas Hugoton Field up to the minimum rate required by the Republic "A" contract (Republic's F.P.C. Gas Rate Schedule). Thus is made clear the Kansas Commission's real and underlying purpose in issuance of the challenged regulations—to require Northern to purchase increased volumes of gas from the Kansas portion of the Hugoton Field.

An excellent analysis disclosing complete understanding of the problem faced by Northern in these cases may be found in Mr. Justice Schroeder's dissenting opinion, 188 Kan. 355, 363, 362 P.2d 599 (Jurisdictional Statement, Appendix A, Page XIII).[5]

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4. *Republic Natural Gas Co.* v. *Northern Natural Gas Co.*, Nos. 4161 and 4235, currently pending in the District Court of Stevens County, Kansas, to recover damages for alleged breach of contract for failure to purchase gas, in amounts aggregating in excess of $26,000,000.00.

5. Mr. Justice Schroeder remarked, *inter alia*:

"The record discloses that for the entire period from April, 1944, through February, 1958, there were no important

It would appear to be clearly manifest that the unratable production existing in the Kansas Hugoton Field was brought about in these cases by (a) Kansas Commission's own acts in fixing an unrealistic and arbitrary market demand in the Kansas Hugoton Field creating fictitious well allowables therein, and (b) Kansas Commission dedicating its policy not to conservation and the protection of correlative rights as authorized by the Kansas statutes and required by the Basic Proration Order for the Kansas Hugoton Field, but rather to the forcing of more gas from the field to be sold in interstate commerce for resale so that the Kansas portion of this interstate gas field would receive what Kansas Commission believes to be that field's

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differences between the ratable purchases by Northern from Republic 'A' wells and other wells to which it was connected. The difference in ratio was less than one times the January allowable for essentially the entire period.

"However, in the spring of 1958, a wide difference in Northern's purchases appears between the Republic 'A' wells and the others.

"The reason stated to the Commission and assigned by Northern for this difference is '* * * First, as the Commission is well aware, *allowables granted by the Commission to the field have exceeded the total field production by approximately 130 billion cubic feet* and the wells connected to Northern, other than the Republic 'A' wells, have become substantially underproduced. Second, is the fact that Northern has been seriously delayed in expanding its system into new markets for gas by reason of the failure of the Federal Power Commission to issue the necessary Certificates of Public Convenience and Necessity. * * *' (Emphasis added).

"Testimony on behalf of Northern was that given sufficient time it would be able to conduct its operations in such a way that the taking from the wells to which it was connected would be ratable. This was based *on the assumption that the Commission's future allowable assignments will be realistic*, and on the further assumption that the necessary expansion certificates will be issued to Northern by the Federal Power Commission.

"It must be recognized that Northern's Republic 'A' contract is subject to all valid legislation with respect to gas purchases in the Hugoton Field, either state or federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction. (See,

fair share of the interstate markets of the respective pipeline companies purchasing gas therein."

As noted heretofore, the Hugoton Gas Field sprawls across three States, Kansas, Oklahoma and Texas. As this

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Northern Natural Gas Co. v. *Republic Natural Gas Co.*, 172 Kan. 450, 478, 241 P.2d 708.) The testimony on behalf of Northern was that as far as facilities were concerned, it was not physically impossible for Northern to take gas ratably from the Republic 'A' wells and all other wells connected to its system. The evidence further disclosed that if the markets were sufficient so that Northern could take the current allowables from the Republic 'A' wells and also take the current allowables from all other wells connected to it, then Northern's take would be ratable as between all wells connected to its system. In other words, *when the market conditions are at the same level as the allowables then the same return of take would exist between the Republic 'A' wells and all other wells to which Northern was connected.*

"Theoretically, when these facts are considered in the light of the Basic Proration Order for the Hugoton Field and the statute pursuant to which it was promulgated, if the Commission is not derelict in its duty *to correlate allowable production with the market demand*, all wells of necessity would be *produced* ratably without supplementation by any order or rule to control the *purchasers* of gas in the Hugoton Field. Taking into consideration the entire history of Northern's purchases of gas in the Hugoton Field starting from April, 1944, the above theory seems to have practical application.

"It is readily apparent that any effort to control the purchase of gas, which of necessity on the facts before the Court in the instant case is limited to those wells connected to Northern's gathering system and pipe line, cannot protect the correlative rights of all producers from the common source of supply in accordance with the mandate of the statute. It fails to take into consideration those wells, potentially capable of production, which have no market for their gas, and the differential in markets among the various purchasers of gas from the common source of supply. Therefore, if the Commission fails to exercise its power *to correlate production with demand*, it cannot accomplish the mandate of the statute, and resort to a method which requires *the purchasers* of gas in the Hugoton Field to take (purchase) ratably from the wells to which each is connected is little more than a futile gesture." (Emphasis added by Court) (Insert supplied by appellant).

6. The Kansas Commission has been in recent years committed to a policy of attempting to force interstate purchasers to increase their purchases of gas from the Kansas Hugoton Gas

Court said in *F. P. C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 5 L. Ed. 2d 377, 81 S. Ct. 435, one of such producing States in a common source of supply might wish to prolong its gas reserves for as long as possible while another might desire to deplete the field as rapidly as possible. The rule, as stated by this Court in *U.S.* v. *Louisiana*, 363 U.S. 1, 33, 4 L. Ed. 2d 1025, 80 S. Ct. 961, that a land boundary between two states marks the place where the full sovereignty of one state ends and that of another begins, points up very clearly the impact on interstate marketing of gas from this single interstate common source of supply when one state attempts to conserve its gas and another decides to force speedy depletion of this exhaustible natural resource.[7]

If each gas producing state has the jurisdictional right, either exclusively or concurrently with the Federal Power Commission, to control such sales, there must necessarily result a lack of uniformity in the construction or modification of the controlling rate schedules resulting in complete

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Field in interstate commerce for resale. (See paper of Richard C. Byrd, Commissioner (now Chairman), Kansas Corporation Commission, entitled *Contractual and Property Rights As Affected by Conservation Rules and Regulations*, published in 10th Annual Institute on Oil and Gas Law and Taxation by the Southwestern Legal Foundation, Dallas, Texas, at page 1 and particularly pages 13 through 15.) (As noted heretofore (Fn. 3), the validity of Kansas Commission market demand orders effectuating such policy is being contested in numerous earlier cases docketed and pending in the Supreme Court of Kansas, including those numbered 41515, 41516, 41555 and 41556.)

7. Analogous to this situation is the competition between Oklahoma and Kansas to fix prices for gas produced and sold in interstate commerce from the Hugoton Field. Oklahoma's price fixing efforts were stricken down by this Court in *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576, while the Kansas effort to fix an even higher price was stricken down by this Court in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381.

confusion and the stripping of all vitality from the jurisdiction of the Federal Power Commission over sales of gas in interstate commerce for resale.

The objectives of the Kansas Commission in these appeals, as analyzed herein and approved by the Supreme Court of Kansas, are not legitimate State objectives. Although the Orders and Rule, here involved, ostensibly have as their purpose the regulation of production, it is significant that the one is directed to Northern as a purchaser and the other is directed to all purchasers in the field. They do not regulate production since production of gas has ended at the point the purchaser takes (i. e. purchases) gas from the producer. Production is "the act of bringing forth gas from the earth." *Saturn Oil & Gas Co.* v. *Federal Power Com'n.*, (C.A. 10), 250 F.2d 61, 64, cert. den. 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542. Under the Republic "A" contract (Republic F.P.C. Gas Rate Schedule), gas is purchased by Northern at the point of delivery which is designated as the point at which Northern's pipe lines connect to Republic's facilities at the wellhead (R. 143-144). At such point production has been completed and the sale of the gas is subject to the exclusive regulation of the Federal Power Commission. *Continental Oil Company* v. *Federal Power Commission* (C.A. 5), 266 F.2d 208.

Assuming arguendo, that State regulation of production itself may be within the "production and gathering" exemption of the Natural Gas Act (15 U.S.C.A. 717 (b)), merely calling these regulations (Orders and Rule), regulations of production does not make them so, nor extend the cloak of such exemption. This Court made it plain in the recent case of *Gomillion* v. *Lightfoot*, (1960) 364 U.S. 339, 347, 5 L. Ed. 2d 110, 117, 81 S. Ct. 125, that:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal

judicial review. *But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition'.*" (Emphasis added).

Two things are really at issue here: Does the State of Kansas have the power to regulate sales and purchases of such gas in interstate commerce for resale; and may Kansas do indirectly what it cannot do directly; i. e., force Northern to purchase more gas from the wells to it connected in the Kansas Hugoton Gas Field? At one of the hearings before the Commission, an expert witness testifying for Cities Service Oil Company, which owned wells connected to Northern's pipeline in the field, stated that there were two alternative solutions to the unratable situation in the field: "One is to raise the total Northern Natural's takes up until they are ratable with the Republic 'A' group, and *second would be to lower Republic 'A' by curtailing their production, so they will become ratable with the balance of the field.*" (Emphasis added) (R. 33).

The Kansas Commission chose the first of such suggested alternatives. The regulations complained of were addressed exclusively to purchasers. It is clear, therefore, that the objective of the Kansas Commission in promulgating these regulations was neither conservation nor protection of correlative rights, but rather to force Northern to more speedily deplete the reserves underlying the wells to it connected in the Kansas Hugoton Gas Field.[8]

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8. Kansas Supreme Court refers to testimony that Northern's facilities would permit taking ratably from all wells in the field to its system connected. Of course that was true to the extent of its market demand and facilities in such "field". That

The orderly administration of the Natural Gas Act requires that this Court strike down this latest attempt by the State of Kansas to regulate sales of natural gas in interstate commerce for resale just as it did in the recent state minimum price cases.[9]

CONCLUSION

The judgments of the Supreme Court of the State of Kansas should be reversed.

Respectfully submitted,

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October, 1962

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did not mean that Northern could purchase the production from all such 1100 wells up to the contract requirements under the Republic "A" contract. Rather it was compelled to purchase less than the net Kansas Commission allowables of the Republic "A" wells so that production therefrom would be ratable with the purchases by Northern from the other wells in such field connected to its pipeline. Here the Kansas Commission endeavored to compel Northern to accelerate depletion of its contracted reserves and only the Federal Power Commission has the jurisdiction to determine whether or not that would be in the public interest.

9. *Natural Gas Pipe Line Co. v. Panoma Corp.*, 349 U.S. 44, 99 L.Ed. 866, 75 S. Ct. 576; *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381.

APPENDIX A

No. 42,128

NORTHERN NATURAL GAS COMPANY,
Appellant,

v.

STATE CORPORATION COMMISSION,
Appellee.

Syllabus by the Court

1. Gas—*Powers of Corporation Commission—Ratable Taking by Purchaser.*

The provisions of G.S., 1959 Supp., 55-703 are considered and held to be sufficient to give the Corporation Commission powers to pass rules to insure the fair and equitable taking of natural gas from a common source, and in such an attempt to provide for the ratable taking of natural gas by a purchaser.

2. Same—*Order of Commission—As to Ratable Taking by Purchaser—Validity.*

It is further decided that such an order as described in the first paragraph hereof did not impair the obligation of a contract possessed by the purchaser or impinge upon other constitutional rights of the purchaser.

3. Same—*Order of Commission—As to Ratable Taking by Purchaser—Federal Power Commission's Authority Not Impaired.*

It is also further decided that the order of the Commission as to the ratable taking of natural gas concerns

only the production and gathering of gas and in no way impairs the control of the Federal Power Commission over the transportation of natural gas in interstate commerce under the federal Natural Gas Act, 15 U.S.C.A., §717 *et seq.*

Appeal from Finney district court; ROLAND H. TATE, judge. Opinion filed June 10, 1961. Affirmed.

Mark H. Adams II of Wichita argued the cause, and *Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, John S. Seeber* and *Floyd E. Jensen*, of Wichita; *Lawrence I. Shaw, F. Vinson Roach*, and *Patrick J. McCarthy* of Omaha, Nebraska; *Ray H. Calihan, Logan N. Green, Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, of Garden City were with him on the briefs for the appellant.

Charles C. McCarter, general counsel, argued the cause, and *S. F. Fleeker*, assistant general counsel, was with him on the briefs for the appellee.

The opinion of the court was delivered by

JACKSON, J.: The appellant Northern Natural Gas Company began a judicial review action in the court below to review an order of the Corporation Commission directing it to take gas ratably from all gas wells in the Kansas Hugoton Gas Field to which its lines were connected including the gas wells owned by Republic Natural Gas Company with which company it had a special contract as to the purchase of gas. The district court affirmed the order of the Commission, and the appellant brings the matter to this court on an appeal from the district court's decision.

Throughout the remainder of this opinion we shall refer to the above parties as "Northern," "Republic," and the "Commission."

For many years Northern and Republic have been parties to a contract under which Northern agreed to take and pay for a sufficient amount of natural gas to supply 60% of the supply needed by Northern to satisfy the needs of its customers in a certain area in Iowa and Nebraska. The exact location of this area in Nebraska and Iowa is not important, but it is referred to in the briefs as the Omaha District. This contract covers only some 144 wells owned by Republic and in the briefs this group of wells is referred to as the "Republic A" wells.

The above contract has been before this court in the former case of *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708, in which opinion a more detailed account of the contract may be found.

There can be no question that Northern is engaged in the interstate transportation of natural gas by pipe line for sale in states other than Kansas, as defined in the Natural Gas Act. In the last case mentioned, the question at issue was the amount of gas which could be lawfully produced under the above contract and regulations of the Commission. The important part of the syllabus of the case just cited reads: "An operator of gas wells . . . as to the amount of gas he can produce from the wells, is governed by the allowables for such wells made by the commission for the time in question and not by slightly less than three times such allowables."

Another case which is connected wth this same contract between Republic and Northern is that of *Republic Natural Gas Co.* v. *State Corporation Commission*, 173 Kan. 172, 244 P.2d 1196. Those interested in an account of the manner of establishing proration allowables for gas wells in the Hugoton field are directed to the opinion in

the last mentioned case. The case affirmed the Commission in making an order refusing to reinstate canceled "underages" of certain gas wells owned by Republic. The canceled underages had been canceled according to the rules of the Commission applying to the entire Hugoton field.

As early as 1938, Northern had begun to purchase additional gas supply in the Hugoton field in addition to the Republic "A" wells. In 1949, Northern entered into a gas purchase contract with Cities Service Oil Company. Thereafter, Northern purchased other gas supply and now owns some 125 gas purchase contracts.

These gas purchase contracts cover a total of some 1,100 gas wells in the Hugoton field. Such contracts contain provisions for the ratable taking of gas between all gas wells with the exception that Republic "A" wells are specifically excepted from the provision for ratable taking and are given preference where the demand for gas does not equal the allowables for all of the wells. A copy of such contracts [*sic*] is contained in the abstract but need not be reproduced in this opinion.

Northern's position is quite clearly and forcefully stated in the following quotation taken from its brief:

> "As Northern has interpreted its commitments under its gas purchase contracts in such field, when Northern's market requirements from the field are less than the total allowables assigned to the wells connected to Northern, Northern's contractual commitment (as previously interpreted by the Court) under the Republic 'A' contract is first deducted from Northern's gas requirements and allocated to the Republic 'A' wells. The balance of Northern's requirements is then allocated ratably to all other wells to it connected in such Field."

Northern further tells us that from 1944 until 1958, Northern was largely able to take ratably from all wells connected with its lines, but it seems to concede that during 1958, it took gas from Republic "A" wells at a much greater rate than from the rest of the wells connected to its gathering lines. In January, 1959, the Cities Service wells connected to Northern's lines had a monthly allowable of 2,084,874 Mcf. They had an underage of 11,411,727 Mcf., and 123,711 Mcf. of these underages were canceled by the Commission under its general rules as being underproduced in excess of six times the January current allowable. Northern's other connections aside from Republic "A" wells had a January current allowable of 9,309,441 Mcf. and a total underage of 48,604,070 Mcf.

The net status of these wells was 522.09 percent under produced, and they suffered cancellation of 409,393 Mcf. of the aforementioned underage.

In contrast, Republic "A" wells had a current January allowable of 2,674,390 Mcf. and an overage of 114,858 Mcf. They were overproduced 4.29 percent in that particular month.

Northern makes no claim that it would not have been possible to take gas ratably from all of its wells. It only claims that the contract with Republic gives it the right to prefer Republic "A" wells.

On May 27, 1959, the Commission on its own motion took notice of the above situation and issued an order to Northern to show cause why it should not take ratably from the wells to which it is connected in the Hugoton field in Kansas. The hearing was set first on June 26, 1959, but later continued to July 24, 1959 and the order appealed from was issued October 7, 1959.

At the hearing before the Commission, an expert witness testified as follows:

> "... I have expressed an opinion that there is drainage occurring. Our studies indicate that if the wells are produced with the same percent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected. There are two ways of accomplishing this currently in the Hugoton Field. One is to raise the total (of) Northern Natural's takes up until they are ratable with the Republic 'A' group, and second would be to lower Republic 'A' by curtailing their production, so they will became ratable with the balance of the field."

We do not read the record to show that there is any contention but that drainage was occurring, and that the underproduced wells were losing the right to produce gas from the common source of supply to the great damage of the owners of the wells in the loss of their correlative rights.

While the members of this court make no claim to be experts in the science of the production of natural gas, we believe that the court may take judicial notice of the fact that where natural gas is within the earth in one common source and is under pressure, if one gas well is allowed to take gas, this will result in the pressure being lowered around the vicinity of this gas well so that the gas in the common source will tend to drain or rush to the vicinity of the well taking gas. The result will be that the other wells in the common field or source will be able to produce much less gas and the owners of such wells will have suffered a definite loss.

It should be noted at this time that shortly after the issuance of the order of the Commission dated October 7,

1959, directed only to Northern and which is appealed from in this present proceeding, the Commission, after due notice and hearing, issued a general rule applicable to all takers of natural gas from the Hugoton gas field and requiring that all takers of gas take ratably from the wells to which they are connected. Northern's appeal from that general order is to be found in *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. 351, 362 P.2d 609.

In attempting to sustain its position in the present case, Northern first contends that our state Natural Gas Act does not provide for ratable taking; that the act applies only to producers of gas; that Northern is a purchaser of gas and a natural gas company engaged in interstate commerce. It refers to section 55-703, G.S., 1959 Supp., and stresses the first part of the section which refers to producers. But Northern has ignored the latter part of the section wherein the following language is found:

> "The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent."

In Summers on *Oil and Gas*, Vol. 1A, sec. 103.1, p. 139, wherein the eminent author is dealing with ratable taking

of oil and gas, that part of section 55-703 set out above is noted and the author concludes as follows:

> "The Kansas gas conservation act authorizes the state corporation commission to so regulate the taking of gas from any common source of supply as to prevent inequitable and unfair taking. This act does not expressly state that purchasers of gas in the common source of supply may be required to take ratably from all wells with which their pipe lines may be connected, *but unless the commission has such authority it cannot prevent inequitable and unfair taking.*" (Italics supplied)

It will be noted that the Commission is authorized to make rules and regulations for the purpose of accomplishing the results to which the Commission is directed; and that such rules and regulations have the force and effect of law when filed in the office of the revisor of statutes (G.S. 1949, 77-410).

In search of Commission's Rule 82-2-101, which has been so filed, we find the following: "Taker: See purchaser." And in the same rule, purchaser is defined as follows:

> "Purchaser shall mean any person who directly or indirectly purchases, transports, takes, or otherwise removes production to his account from a well, lease or common source of supply. Purchaser is usually considered to be the person holding the division order." (Italics supplied) (*Sic*)

We believe Northern is mistaken in arguing that the above statute and the rules made thereunder do not apply to a purchaser of natural gas. We are only more convinced that the legislature had this in mind, by the fact that natural gas cannot be produced unless someone is ready to buy it, it cannot be stored in a tank on the lease.

Therefore, as Professor Summers says, the object of the quoted provisions of section 55-703 cannot be accomplished unless the taker or purchaser can be controlled. We believe the statute is sufficient to reach Northern.

We note that in its brief, the Commission has directed attention to certain language in the opinion of *Republic Natural Gas Co.* v. *State Corporation Commission*, supra. While the whole opinion in that case is in line with what we are now deciding, the precise question now before us was not there involved.

The second objection to the validity of the order of the Commission appealed from is sweeping in its coverage and reads as follows:

"II

"Said order as approved by the trial court is arbitrary, unreasonable and discriminatory, has no relation to proration or conservation of gas, burdens interstate commerce and takes appellant's property and contract rights, all in violation of the commerce clause, the contract clause and the fourteenth amendment to the federal constitution, and the Kansas Bill of Rights, sections one, two and eighteen, and section seventeen, article two of the Kansas constitution."

Despite the sweeping indictment of the order, Northern really seems to simply argue that the contract has established the correlative rights of the parties, and that therefore, the state is powerless to prevent waste and drainage of gas as long as the monthly allowables are not unlawfully exceeded.

We would direct attention to a provision of the contract upon which Northern relies, and which reads:

"SECTION 2. *Commission Jurisdiction.* This contract is subject to all valid legislation with respect

to the subject matter hereof, either State or Federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction."

We cannot agree with the argument that the monthly allowable is the whole story. Certainly, the wells attached to Northern and apart from Republic "A" are losing gas to Republic "A" and possibly to any other taker who is taking gas at a greater rate than Northern is allowing gas to be produced from these wells.

It would seem that ratable taking in the production of natural gas has been late in coming before this court for approval. The Supreme Court of Oklahoma upheld an order of the Corporation Commission of that state providing that a purchaser of natural gas must take gas from a producer having no contract with the purchaser and must also take ratably from the aforesaid producer; see *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Okla. 35, 220 P.2d 279, affirmed on appeal, 340 U.S. 179, 95 L. Ed. 190, 71 S. Ct. 215.

It would appear to us that the opinions of the Supreme Court of Oklahoma and of the Supreme Court of the United States in the above case foreclose any of Northern's arguments in the case at bar. There was a matter of contract involved in the Peerless case. Cities Service undoubtedly thought they had a right to take gas from the wells from which it had contracted to buy gas, and that it had no duty to contract with Peerless. But it was held that the state might prevent drainage of gas from the Peerless wells despite the contracts held by Cities Service.

Certainly, in view of the above quoted provision of the contract between Northern and Republic, there has

been no impairment of the obligation of contract in this case or any other impairment of constitutional right.

Lastly, Northern contends that the order of the Commission impinges upon the authority of the Federal Power Commission under the Natural Gas Act, 15 U.S.C.A., §717 *et seq.*

As above noted, we are quite well aware that Northern is engaged in the transportation and sale of natural gas in interstate commerce by pipe line. We do not believe, however, that the matters dealt with in this case affect interstate transportation or sale in any respect. That is, the matters dealt with in this case pertain to "production and gathering of natural gas." (15 U.S.C.A., §717(b)).

It should again be emphasized that the Commission's order did not direct Northern as to the amount of gas which it should take, it only directed that the amount Northern needs shall be taken ratably from all the gas wells which Northern serves. Northern agrees that it could do this, but says it would have to give up its contracted preference to Republic "A" wells. Everyone would be happy if Northern would take the entire monthly allowable from all of the wells served. Northern says that in the near future it believes that it will be able to do this very thing.

We believe that the state may regulate the production of natural gas and the gathering of the same to the extent necessary to insure that the gas under one owner's land will not be drawn off by his neighbor, and that his neighbor cannot plead a contract with a third person to give him a right to drain gas from his neighbor.

All of the matters contained in Northern's brief have been fully considered, and we find that the order appealed from must be affirmed. It is hereby so ordered.

SCHROEDER, J. (dissenting): The Commission by its order directed to Northern assumes it has authority under G.S. 1949, 55-703, as amended, to control and regulate *purchases* of gas by Northern, engaged in the interstate transportation of gas. This, in my opinion, is beyond the authority of the statute.

What the Commission in the instant case (No. 42,128), and in the companion case (No. 42,127), purports to do is to set up one proration system, having application to *purchasers*, within a proration system controlling *production* under the Basic Order for the Hugoton Gas Field adopted on the 21st day of March, 1944, *which was designed and declared by the Commission to "accomplish the purposes for which article 7, chapter 55, General Statutes of Kansas for 1935 was enacted."* (Basic Proration Order for the Hugoton Gas Field, paragraph m.) (Emphasis added.)

By the Commission's order dated October 7, 1959, Northern was directed to take gas ratably from its connections in the Kansas Hugoton Gas Field (Case No. 42,128), and by the Commission's order promulgating Rule 8-2-219 (sic) (Case No. 42,217), all companies *purchasing gas* from a common source of supply under proration by the Commission are required to take gas in proportion to the allowables from all the wells to which each is connected.

The Basic Proration Order for the Hugoton Gas Field, as amended, and in effect at times material, by a system of proration, controls the *production* of gas in the Hugoton Field. The end sought in fixing *production quotas* was to enable each developed lease to currently produce its daily allowable so that ultimately such developed lease would have an opportunity to produce approximately the amount of gas which underlies such lease. It recognized the available production of the wells in the Hugoton Field was far in excess of the market demand, and found:

"f. That since there exists disproportionate *production* from the wells and leases in said field which impairs the correlative rights of many of the owners of developed leases, it is necessary for the Commission to take jurisdiction and to prescribe *regulations for the production of gas* from said wells and others that may be hereafter completed in said field to the end that each person, firm, or corporation *having the right to drill into and produce natural gas from said field may take therefrom only such proportion of the amount that may be produced therefrom without waste* as will permit each well or developed lease to *produce* ultimately at least approximately the amount of gas underlying the land or lease on which such well is located and *currently produce proportionately* with the other wells in said field . . ." (Emphasis added.)

The basic order adopted a formula which was said to have a reasonable relation to the prevention of waste, to the prevention of inequitable and unfair *production of gas from the common source of supply*, and to the prevention of unreasonable discrimination in favor of one *producer* in said field and against another *producer* therein (paragraph m). The order directed that there be held two market demand hearings for each year (paragraph n) to determine the market demand for natural gas from the Hugoton Field for the next succeeding proration periods, and directed the preparation and promulgation of a new schedule of *production* allowable for the wells in said field, *based upon the determination made as a result of the market demand hearing* (paragraph o).

The record presented discloses that pursuant to paragraph "n" of such basic proration order, two market demand hearings for each year were and are held by the Commission, and market demand orders were and are issued for six-month periods (October 1 to March 31 and

April 1 to September 30), in addition to which monthly *proration or allowable orders were and are issued for each month spreading and allocating the market demand and fixing the monthly allowables assigned to each of the producing gas wells in said field.*

The record discloses that for the entire period from April, 1944, through February, 1958, there were no important differences between the ratable purchases by Northern from Republic "A" wells and other wells to which it was connected. The difference in ratio was less than one times the January allowable for essentially the entire period.

However, in the spring of 1958, a wide difference in Northern's purchases appears between the Republic "A" wells and the others.

The reason stated to the Commission and assigned by Northern for this difference is:

> ". . . First, as the Commission is well aware, *allowables granted by the Commission to the field have exceeded the total field production by approximately 130 billion cubic feet* and the wells connected to Northern, other than the Republic 'A' wells, have become substantially underproduced. Second, is the fact that Northern has been seriously delayed in expanding its system into new markets for gas by reason of the failure of the Federal Power Commission to issue the necessary Certificates of Public Convenience and Necessity . . ." (Emphasis added.)

Testimony on behalf of Northern was that given sufficient time it would be able to conduct its operations in such a way that the taking from the wells to which it was connected would be ratable. This was based *on the assumption that the Commission's future allowable as-*

signments will be realistic, and on the further assumption that the necessary expansion certificates will be issued to Northern by the Federal Power Commission.

It must be recognized that Northern's Republic "A" contract is subject to all valid legislation with respect to gas purchases in the Hugoton Field, either state or federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction. (See, *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 478, 241 P.2d 708.)

The testimony on behalf of Northern was that as far as facilities were concerned, it was not physically impossible for Northern to take gas ratably from the Republic "A" wells and all other wells connected to its system. The evidence further disclosed that if the markets were sufficient so that Northern could take the current allowables from the Republic "A" wells and also take the current allowables from all other wells connected to it, then Northern's take would be ratable as between all wells connected to its system. In other words, *when the market conditions are at the same level as the allowables then the same return of take would exist between the Republic "A" wells and all other wells to which Northern was connected.*

Theoretically, when these facts are considered in the light of the Basic Proration Order for the Hugoton Field and the statute pursuant to which it was promulgated, if the Commission is not derelict in its duty *to correlate allowable production with the market demand*, all wells of necessity would be *produced* ratably without supplementation by any order or rule to control the *purchasers* of gas in the Hugoton Field. Taking into consideration the entire history of Northern's purchases of gas in the

Hugoton Field starting from April, 1944, the above theory seems to have practical application.

It is readily apparent that any effort to control the purchase of gas, which of necessity on the facts before the court in the instant case is limited to those wells connected to Northern's gathering system and pipe line, cannot protect the correlative rights of all producers from the common source of supply in accordance with the mandate of the statute. It fails to take into consideration those wells, potentially capable of production, which have no market for their gas, and the differential in markets among the various purchasers of gas from the common source of supply. Therefore, if the Commission fails to exercise its power *to correlate production with demand,* it cannot accomplish the mandate of the statute, and resort to a method which requires *the purchasers* of gas in the Hugoton Field to take ratably from the wells to which each is connected is little more than a futile gesture.

It must be assumed the legislature was aware of the situation regarding the production and development of gas in this state when 55-703, *supra,* was first enacted in 1935, and when subsequent amendments were made thereto, but it did not expressly authorize the Commission to require purchasers of gas in the common source of supply to take ratably from all wells to which their pipe line was connected. It undoubtedly felt the control of production was sufficient to accomplish the purposes for which the statute was enacted.

An analysis of G.S. 1949, 55-703, as amended, (now G.S. 1959 Supp., 55-703) will disclose the Commission has no jurisdiction over purchases of gas by an interstate pipe line company. Our gas conservation law is Chapter 55, Article 7, and is entitled "PRODUCTION AND CONSER-

VATION OF NATURAL GAS." The applicable section of this statute is 55-703, *supra*. In pertinent part it reads:

> "[1] Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, *then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced* without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. [2] The commission shall so *regulate the taking of natural gas from any and all such common sources of supply* within this state as to prevent the *inequitable or unfair taking from such common source of supply* by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and *in favor of or against any producer* in any such common source of supply . . . " (Emphasis and numbers added.)

In both cases the Commission relies upon the above quoted portion of the statute marked [2], categorically stating this is the source of its jurisdiction.

An examination of this portion of the statute, and those portions thereof which have been italicized, makes

it clear that *the taking referred to,* over which the Commission is to have regulatory jurisdiction under certain circumstances, *is from the common source of supply.* As applied to the Kansas Hugoton Gas Field the common source of supply would be the so-called "Hugoton Pay Zone," or the producing horizon described as gas encountered at an average depth of from 2700 to 2800 feet below the surface within the Kansas Hugoton Gas Field. Therefore, the taking referred to is not a taking from the wellhead, or from a producer, or from the end of a gathering system owned by the producer some miles from the wellhead, but the taking referred to is from the common source of supply.

It must be noted the phrase "person, firm or corporation" used in both the first and second portions of the quoted statute, is defined in the first portion as one *"having the right to produce natural gas."* (Emphasis added.) It is difficult to believe the legislature intended that on the one hand such expression referred to a producer, and on the other hand to a purchaser.

The court in *White Eagle Oil Co. v. State Corporation Comm.*, 168 Kan. 548, 214 P.2d 337, quotes a portion of the first sentence of the section of the statute in question which it construes as being the statutory mandate or declaration of public policy with regard to *production.*

While the Commission's general rules and regulations, in Rule 92-2-101 (sic), under the definition of "taker" refers the reader to the definition of "purchaser," the rules do not give the Commission jurisdiction to regulate purchases, unless such authority is found in the statute. In other words, if the statute does not confer power upon the Commission to regulate the purchases of gas, it cannot confer such power upon itself by the adoption of a rule.

The State Corporation Commission of Kansas has a limited jurisdiction. It possesses no powers not given it by statute. (*Bennett* v. *Corporation Commission*, 157 Kan. 589, 596, 142 P.2d 810; *Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 80 L. Ed. 528, 56 S. Ct. 397; 24 Am. Jur., Gas and Oil, §144, p. 628; and see, *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U.S. 627, 77 L. Ed. 1410, 53 S. Ct. 768.)

On those several occasions over the life of the statute when this court has been called upon to construe 55-703, *supra*, and its companion sections, it has consistently construed such act as a statute giving authority to regulate production, and not purchases. (*Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, supra; and *Republic Natural Gas Co.* v. *State Corporation Commission*, 173 Kan. 172, 244 P.2d 1196.)

In *Republic Natural Gas Co.* v. *State Corporation Commission*, supra, the court in substance said that the continuing duty on the part of the Commission was to cause the *production* of gas from any well to be ratable, in accordance with the provisions of the statute and the basic order; and that no operator or producer had any vested right to produce from any well more gas in any month than was assigned it as its allowable, the entire matter of *producing gas* from a well being subject to the provisions of the basic order and the statute. In other words, under 55-703, *supra*, to "take" gas means to "produce" gas. The essence of the gas conservation statute is that it operates on the operator or producer of the well.

In construing our oil conservation statute, which is very similar to our gas conservation statute, this court in *State, ex rel.*, v. *Sinclair Pipe Line Co.*, 180 Kan. 425, 304 P.2d 930, stated:

"The statutes with reference to waste are G.S. 1949, 55-601 to 55-608, inclusive. The production of crude oil in such a manner as to constitute waste is prohibited by G.S. 1949, 55-601, and made a crime by G.S. 1949, 55-607. *The statute refers only to production.* Sinclair, as we have demonstrated, is engaged strictly in interstate transportation of crude oil. The Oklahoma statute on waste is almost identical to ours. In speaking of that statute, the supreme court of the United States held in *Champlin Rfg. Co.* v. *Corporation Commission*, 286 U.S. 210, 76 L. Ed. 1062, 52 S. Ct. 559:

"'It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products'." (pp. 437, 438.) (Emphasis added.)

It is significant to note that the oil statute, G.S. 1949, 55-603, states in part: ". . . *any person having the right to drill into and produce* oil therefrom may *take* therefrom . . ." (Emphasis added.) (See, Two Cases on Conservation, Vol. 6, J.B.K. p. 149, by H. H. Lesar.)

It is apparent that heretofore the Commission itself has always construed the statute in question as one authorizing the regulation of production, and not purchases. In paragraph "f" of the Basic Proration Order for the Hugoton Gas Field the Commission found "The present and past *production* from the wells in said field is and has been *inequitable* and *unfair*." (Emphasis added.) At another place in paragraph "f" the Commission found "it is necessary for the Commission to take jurisdiction and to prescribe regulations for the *production* of gas." (Emphasis added.)

In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co*, 203 Okla. 35, 220 P.2d 279, the Oklahoma Supreme Court directed Cities Service, a purchaser of gas, to take gas

ratably from other wells in a given field. From this decision the Commission argues that ratable take statutes do in fact apply to purchasers as well as producers.

It must be noted in the state of Oklahoma the legislature has enacted a *common purchasers' statute*, requiring that purchasers of gas shall purchase and transport natural gas from each person or producer ratably, in proportion to the average production, and prohibits such common purchasers from discriminating in price or amount for like grades of natural gas or facilities as between producers or persons. (52 Okl. St. Ann., §23.) Also, the legislature of Oklahoma in its conservation of oil and gas *statute* has defined the term "taker" to include a purchaser of natural gas as follows:

> "(i) The term 'Taker' shall include any person, who, acting alone, or jointly with any person or persons, is directly or indirectly purchasing or transporting by any means whatsoever or otherwise removing oil or gas from any common source of supply in this State. Laws 1947, p. 326, §1." (52 Okl. St. Ann., §86.1.)

It is clear the Kansas Corporation Commission cannot look to the statutes of other states, or to the judicial construction of such statutes, for power to control purchasers of gas in Kansas under the provisions of G.S. 1949, 55-703, as amended.

Both the statute and the Basic Proration Order for the Hugoton Gas Field purport to give the Commission jurisdiction over the regulation of production only. In other words, the "taking" which must be ratable under the statute and the basic order is the *production* of gas from the common source of supply, not the *purchasing* of gas. By a mandatory direction from the legislature the

Commission has jurisdiction over production, so that such production will neither be inequitable nor unfair. The "Order" (Case No. 42,128) and the "Rule" promulgated by the Commission (Case No. 42,127) here under review which is directed to purchasers, rather than operators or producers, and seeking to regulate the purchase of gas, or the manner of making such purchases after production has ceased, rather than to regulate the production itself, are in my opinion invalid because they go beyond the jurisdiction conferred upon the Commission by the statute.

APPENDIX B

No. 42,128

NORTHERN NATURAL GAS COMPANY
Appellant

v.

STATE CORPORATION COMMISSION
Appellee

Opinion Denying Motion for Rehearing

Appeal from Finney district court; ROLAND H. TATE, judge.

Opinion filed August 31, 1961. (For original opinion of affirmance see *ante* p. 355, 362 P.2d 593.)
The opinion of the court was delivered by

JACKSON, J.: In its motion for rehearing Northern disclaims the position of contending that our gas statute G.S. 1959 Supp. 55-703 does not require ratable production of gas from a common source. It says the question is whether the statute also requires ratable purchases of gas. It then warns the court not to invade the jurisdiction of the Federal Power Commission by dealing with purchasers, citing *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035; *Natural Gas Co.* v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576; *Deep South Oil Co. of Texas* v. *Federal Power Com'n.*, 247 F.2d 882; *Saturn Oil & Gas Company* v. *Federal Power Com'n.*, 250 F.2d 61, cert. denied 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542; *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P.2d 528, reversed 355 U.S.

391, 2 L. Ed. 2d 355, 78 S. Ct. 381; and *Cities Service Gas Co.* v. *State Corporation Commission,* 184 Kan. 540, 337 P.2d 640.

We had read those cases before the opinion in this case was announced, and we believe those cases all dealt with the question of the power to regulate the price of gas. As we tried to point out in the opinion as filed, this case in no way involves the price of gas. Northern studiously avoids that fact. Moreover, the ratable taking order does not regulate the total amount of gas which Northern may take. We fail to see how the order affects interstate commerce in any way.

Northern magnanimously states that the state may control the ratable production of natural gas, but fails to inform us how this can be done unless the producer can find a "taker" for his gas.

It is not important in this case that the purchaser has a contract to purchase the gas at a price, which we will assume is subject to the regulation and jurisdiction of the Federal Power Commission, but the only important matter is that the "taker" take gas so that it may be produced. This case involves nothing to our knowledge which has anything to do with the price paid by the purchaser for gas, nor how much gas he buys. The only matter here involved is whether the taker must take ratably from all wells to which he is connected and thus preserve the rights of the land owners.[1] We again refer to the statement of Professor Summers of the University of Illinois

1. Reference might again be made to that part of G.S. 1959 Supp. 55-703, which is quoted in the original opinion, and to the discussion in the late case of *Renner* v. *Monsanto Chemical Co.*, 187 Kan. 158, p. 170, 354 P.2d 326, relating to the proration and ratable taking as to oil.

School of Law set out in the original opinion to show that ratable production can not be accomplished unless the taker will take gas ratably.

Northern has in this case cast some reflection upon the increase of allowables in 1958 by the Kansas Commission. The record contains no facts concerning this action of the Commission. But we must assume that the Commission believed that the market was sufficient to warrant the increase. Moreover, if we are justified in taking judicial notice of facts, we must also assume that the Kansas allowables were not greater than the Oklahoma allowables. And we notice that it was generally thought to be a fact that drainage of gas was occurring from the Kansas Hugoton field to that part of the field in Oklahoma.

Thus, in 1958, the Commission may have been, in a roundabout way, endeavoring to set up ratable taking as between Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells.

Of course, none of this is involved in the record of the case before us. However, we may direct attention to the news story on page 54, in *Newsweek* for July 10, 1961, entitled *Natural Gas: Two Straws*. It is there noted that the Hugoton field covers some 4.1 million acres in Kansas, Oklahoma and Texas; that most of the estimated 300 trillion cubic feet of gas in the field lies under Kansas soil, but that Oklahoma supplies the major share of the 2 million cubic feet pumped daily northward through the pipe lines.

The motion for rehearing is denied.

Schroeder, J., is of the opinion the judgment of the trial court should be reversed, and therefore dissents.

APPENDIX C

NEWSWEEK Magazine
July 10, 1961

Natural Gas:

TWO STRAWS

The biggest border feud since Missouri slaveholders tried to take Kansas away from the abolitionists a century ago was shaping up last week over a vast, $30 billion pocket of natural gas that lies under 4.1 million acres of prairie land in Southwest Kansas, the Oklahoma panhandle, and northern Texas. Most of the estimated 300 trillion cubic feet of gas in the Hugoton field, as it is known, lies under Kansas. But Oklahoma supplies the major share of the daily 2 million cubic feet that is pumped northward through pipelines—and Kansans don't like that at all.

"It's as though there were two straws in the same chocolate soda," a Kansas Official explained last week. "If the soda is sucked up faster through one straw, the man on the end of that straw is going to get more than his share."

In an effort to put a crimp in the Oklahoma straw, the Kansas Supreme Court last month ruled that the Northern Natural Gas Co., whose pipelines carry gas from all sections of the Hugoton field, must pump equally from all their wells. Not only would the ruling mean another $5 million to $10 million annually for well owners in the Sunflower State, but it would stop what Kansans claim is

a steady seepage of their reserves into the Oklahoma portion of the field.

UNFAIR: Alf Landon, the normally calm-speaking ex-governor who was the Republican Presidential candidate in 1936, showed just how riled up Kansans are about what they consider a misuse of the state's natural resources. "To me, corporations which persist in wasting natural gas . . . and persist in violating the rights of Kansas landowners and producers, all to the detriment of the best interests of Kansas, have no real sense of responsibility," he said.

Northern Natural Gas Co., arguing that its pumping pattern had been approved by the Federal Power Commission, last week asked the Kansas court to reverse its decision.

Whatever the outcome, it seemed certain that the border feud was headed for the U. S. Supreme Court. As chairman Harold Freeman of the Oklahoma Corporation Commission put it: "The Kansas Supreme Court doesn't have jurisdiction in this situation. More than 90 per cent of the gas leaving the Oklahoma portion of the Hugoton field goes into interstate commerce."

APPENDIX D

No. 42,127

NORTHERN NATURAL GAS COMPANY,
Appellant,

vs.

STATE CORPORATION COMMISSION,
Appellee.

Syllabus by the Court

Gas—*Order of Corporation Commission—Requiring Ratable Taking by All Purchasing Companies.*

Pursuant to the provisions of G.S. 1949, 55-703, as amended, the State Corporation Commission has power to issue an order promulgating a rule to regulate the production of natural gas in such a manner as to require all gas purchasing companies to take natural gas ratably from all wells within the same common source of supply to which each is connected.

Appeal from Finney district court: ROLAND H. TATE, judge. Opinion filed June 10, 1961. Affirmed.

Mark H. Adams, II, of Wichita, argued the cause, and *Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, John S. Seeber* and *Floyd E. Jensen*, all of Wichita, and *Lawrence I. Shaw, F. Vinson Roach* and *Patrick J. McCarthy*, all of Omaha, Nebraska, and *Ray H. Calihan, Logan N. Green, Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, all of Garden City, were with him on the briefs for the appellant.

Charles C. McCarter, General Counsel, argued the cause, and *S. F. Fleeker*, Assistant General Counsel, was with him on the briefs for the appellee.

The opinion of the court was delivered by

SCHROEDER, J.: This is a judicial review action to determine the validity of a State Corporation Commission order and rule directed to gas purchasers, rather than gas producers, requiring them to purchase ratably from all wells within the common source of supply to which each purchaser is connected.

The petition for judicial review was filed on February 19, 1960, by Northern Natural Gas Company (hereinafter referred to as Northern or appellant) in the district court of Finney County, Kansas. Thereafter on the 8th day of April, 1960, the district court having heard argument of counsel entered its judgment confirming the Commission's order of February 3, 1960, and the Commission's promulgation of Rule 82-2-219 thereby. The lower court found the rule and order of the State Corporation Commission to be lawful, valid and reasonable.

After the trial court overruled Northern's motion for a new trial, appeal was duly perfected to this court.

In a companion case, *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. , P.2d ....., No. 42,128, decided this date, Northern was directed by the State Corporation Commission to show cause why it should not take ratably from the wells to which it was connected in the Hugoton Field in Kansas. As a result of proceedings therein Northern was directed by an order of the Commission "to take gas ratably from its connections in the Kansas Hugoton Gas Field." As a part of such order the Commission retained jurisdiction of the subject matter and the parties for the purpose of entering such

further order or orders and promulgating and implementing such further rules and regulations as from time to time it deemed proper.

In Northern's petition for rehearing before the Commission, filed November 6, 1959, Northern contended, among other things, the order directed against it was unlawful in that:

> "(d) It purports to amend said Commission's Basic Proration Order for the Hugoton Gas Field insofar only as it affects one (Northern Natural Gas Company) of the seven principal purchasers of gas therein and in a proceeding not noticed to any party as being a proceeding for the amendment of said Basic Proration Order all in violation of the due process clause of the Constitution of the United States."

Northern's petition for rehearing in the "show cause" case was denied and judicial review proceedings concerning the Commission's order dated October 7, 1959, were filed in the district court of Finney County, Kansas, now on appeal in the Supreme Court as Case No. 42,128, heretofore noted as the companion case.

The Commission, in apparent recognition of Northern's objection heretofore quoted, sought to bolster its position in the case against Northern, which arose from circumstances applying only to that company, and on November 12, 1959, on its own motion ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. In issuing such order the Commission found:

> "1. That G.S. 1949, 55-703, as amended, imposes the following duty on this Commission:

"'The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation . . .'

"2. Evidence presented to the Commission indicates that some companies have been and are producing certain wells at higher rates than other wells in the same common source of supply; that this disparity in rates of production has resulted in the accumulation of sizable underages by many wells while others are producing their current allowables; that such situation, if permitted to continue, would violate correlative rights, and the statutory provision above set forth.

"3. That in effectuating its statutory duty in the premises, an investigation should be instituted and a public hearing held thereon for the purpose of considering the adoption of a Rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected."

Pursuant to such findings the Commission ordered:

". . . That an investigation be and it is hereby instituted herein for the purpose of considering the adoption of a Rule to require companies to take gas ratably from all wells to which they are connected in the same common source of supply."

Notice was duly published on December 5, 1959, in the Topeka Daily Capital and a copy of such notice was mailed to all interested parties. Pursuant thereto a hearing was conducted in which the interested parties entered an appearance to present evidence and arguments on the matter.

The Commission, recognizing that it was prompted to conduct the instant proceedings by its docket in the matter of Northern to show cause (Docket No. 60,740-C), in which considerable evidence was taken, ordered the testimony and exhibits in Docket No. 60,740-C incorporated and made a part of the record. Therefore, the facts upon which the rule was promulgated in the instant case are in all material respects identical and present the same issues as the companion "show cause" case.

As a result of the hearing the Commission found pursuant to its duty under G.S. 1949, 55-703, as amended, that it was necessary to promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which each is connected, and by its order dated February 3, 1960, adopted Rule 82-2-219, which reads:

"Ratable Production of Gas from Common Source of Supply.

> "In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959, Supp. 55-703; Effective February 8, 1960)."

In promulgating such rule the Commission found it met the mandate of the statute and enabled the Commission "to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected."

The Commission's general rules and regulations for the conservation of crude oil and natural gas were amended by adding Rule 82-2-219, and the Commission directed that its order and rule be filed with the Revisor of Statutes on February 8, 1960, at which date it was to be published and become official.

The contentions of the appellant are presented in its brief by what it denominates "Questions Involved." They are as follows:

"I.

"Said order and the rule promulgated thereby, approved by the trial court, and each of the findings of fact therein purporting to be in support thereof are not supported by substantial, competent, relevant evidence, and are unauthorized by and contrary to the Kansas Statutes dealing with the production and conservation of natural gas, the basic proration order for the Kansas Hugoton Gas Field and Commission's state-wide gas conservation rules and regulations.

"II.

"Said order and the rule promulgated thereby as approved by the trial court are arbitrary, unreasonable and discriminatory, have no relation to proration or conservation of gas, burden interstate commerce and take appellant's property and contract rights all in violation of the Commerce Clause, the Contract Clause and the Fourteenth Amendment to the Federal Constitution, and the Kansas Bill of Rights, Sections One, Two and Eighteen, and Section Seventeen, Article Two of the Kansas Constitution.

"III.

"Said order and the rule promulgated thereby as approved by the Court under the evidence as applied

to appellant violates the provisions of the Natural Gas Act (15 USCA, 717 et seq.) and invades the jurisdiction of the Federal Power Commission thereunder."

The foregoing contentions are identical with those advanced by Northern in the companion "show cause" case, No. 42,128, where they have been considered and answered by the court upholding the power of the Kansas Corporation Commission to regulate the production of natural gas in such a manner as to require Northern to take gas ratably from all gas wells in the Kansas Hugoton Gas Field to which its lines were connected.

It follows that if the Commission has authority pursuant to G.S. 1949, 55-703, as amended, (now G.S. 1959 Supp., 55-703) to lawfully issue such order with respect to one company, *a fortiori*, the Commission may lawfully promulgate and adopt a rule requiring all gas purchasing companies to take natural gas ratably from all wells within the same common source of supply to which each is connected.

We therefore hold Rule No. 82-2-219 and the order promulgating it are valid and lawfully adopted pursuant to the power conferred upon the State Corporation Commission by the provisions of G.S. 1949, 55-703, as amended.

The judgment of the lower court is affirmed.

Schroeder, J., dissents.

APPENDIX E

(Omitting Formal Parts.)

Order

Now on this 7th day of October, 1959, the above-entitled matter comes before the Commission for further consideration and final disposition. The Commission, (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) having examined the record, exhibits, files and briefs of counsel, and being fully advised in the premises, finds:

1. That Northern Natural Gas Company is not taking ratably from its connections in the Kansas Hugoton Gas Field which is a common source of supply.

2. That Northern Natural Gas Company purchases part of its gas from Republic Natural Gas Company under a contract which shall be designated as the "Republic A" contract. That this "Republic A" contract requires Northern Natural Gas Company to take certain quantities of gas or pay for it even if not taken. That this "Republic A" contract has a further provision making it subject to all valid legislation and all valid orders, rules, and regulations of duly constituted authorities having jurisdiction.

3. That the wells dedicated by Republic Natural Gas Company to the fulfillment of this "Republic A" contract have been produced at a much greater rate (percentage of allowables) than other wells connected to the Northern Natural Gas Company system. That the disparity in rates of production has been so great that many wells have ac-

cumulated sizeable underages while the wells producing under the "Republic A" contract are producing the current allowable and some are overproduced. That this is not ratable taking from a common source of supply.

4. That under the Gas Conservation Laws of the State of Kansas, G.S. 1949, 55-703, the Commission is given the duty and power to "so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. . . :" This is also reflected in the Basic Order for the Hugoton Field.

5. That the right to enter into private contracts can not be used as a means to circumvent lawful orders of the Commission or valid laws passed by the Legislature. Therefore the fact that Northern Natural Gas Company may be contractually bound to take a certain quantity of gas from certain wells is not binding on the Commission in its duty to regulate the production of gas from the entire field.

6. That Northern Natural Gas Company should be ordered to take gas ratably from its connections in the Kansas Hugoton Gas Field.

It Is, Therefore, by the Commission Ordered: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

By the Commission It So Ordered.

APPENDIX F

(Omitting Formal Parts.)

Order

Now on this 3rd day of February, 1960, the above-entitled matter comes on for consideration and determination by the State Corporation Commission, hereinafter referred to as the Commission. The Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) having heard the evidence and examined the files and records, and thereby being fully advised in the premises, finds:

1. That on November 12, 1959, the Commission, upon its own motion, ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. That notice of the time and place of said investigation and hearing was published on December 5, 1959, in the Topeka Daily Capital, and that a copy of such notice was mailed to all interested parties. Pursuant to notice, a public hearing was held on December 17, 1959, at the Lassen Hotel, Wichita, Kansas. Appearances were as follows:

Lewis M. Poe and Stuart Carter, representing Colorado Interstate Gas Company;

Stuart R. Carter, representing Sinclair Oil and Gas Company;

Alfred O. Holl and P. K. Smith, representing Cities Service Oil Company;

Ralph R. Brock, representing Northern Pump Company; and W. L. Hartman;

Richard Jones, representing Republic Natural Gas Company;

Milo M. Unruh, representing Kansas-Colorado Utilities, Inc.;

Norton Standaven and Charles Lindberg, representing Pan-American Petroleum Corporation;

O. R. Stites, representing Cities Service Gas Company;

Jeff A. Robertson and C. C. Linley, representing Panhandle Eastern Pipe Line Company;

A. E. Kramer and Dale Stucky, representing Southwest Kansas Royalty Owners Association;

George W. Selinger, representing Skelly Oil Company;

Mark H. Adams, Mark H. Adams, II, and Jack C. Osborne, representing Northern Natural Gas Company;

W. P. Wesley, representing Western Natural Gas Company;

J. L. Higday, representing Kansas Power and Light Company;

J. Robert Wilson and John Townsend, representing the Commission.

The hearing was adjourned for the purpose of receiving and disseminating proposals, until January 21, 1960, at which time the hearing reconvened. Appearances in addition to those entered at the hearing of December 17, 1959, were as follows:

Stanford Smith, representing Cities Service Oil Company;

Homer Penn, representing Republic Natural Gas Company;

Richard Jones, representing Superior Oil Company, a California corporation;

Milo M. Unruh, representing Platean Natural Gas Company;

Richard Jones and William R. Loar, representing Sunray Mid-Continent Oil Company;

Ferd Evans, representing J. M. Huber Corporation;

Donald Mitchell, representing Atlantic Refining Company;

Daniel R. Hopkins, representing Hugoton Production Company;

W. P. Wesley, representing Columbian Fuel Corporation; and

Charles Lindberg, representing Mobil Oil Company, a division of Socony-Mobil Oil Company, Inc.

2. That G.S. 1949, 55,703, as amended, imposes the following duty on this Commission:

"The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *"

3. That for the purpose of facilitating such regulation, and thereby accomplishing the duty contemplated by the statute, it is necessary that the Commission promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which they are connected.

4. That the Commission's staff and other parties have submitted proposals at the hearings, and subsequent thereto, which have been considered by the Commission.

5. That Exhibit "A", designated as Rule 82-2-219, meets the mandate of the statute and will enable the Commission to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected; and that the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas should be amended by adopting the proposed Rule as contained in Exhibit "A", and that said proposal should be designated Rule 82-2-219.

6. That Rule 82-2-219 is of statewide application and should therefore be filed with the Revisor of Statutes on February 8, 1960. This order and Rule 82-2-219, which is attached hereto as Exhibit "A" and made a part hereof, should be served upon all parties affected by this rule by first class United States mail. Further notice should be given by publishing this order including Rule 82-2-219 in the official state paper, on February 8, 1960, and this rule shall become effective on February 8, 1960.

It Is, Therefore, by the Commission Ordered: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960.

And It Is Further Ordered: That this order and said rule, duly certified, be served upon all parties to be affected by first class United States mail and that further notice be given by publishing this order including Rule 82-2-219 in the Official State Paper, on February 8, 1960.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such

Richard Jones, representing Superior Oil Company, a California corporation;

Milo M. Unruh, representing Plateau Natural Gas Company;

Richard Jones and William R. Loar, representing Sunray Mid-Continent Oil Company;

Ferd Evans, representing J. M. Huber Corporation;

Donald Mitchell, representing Atlantic Refining Company;

Daniel R. Hopkins, representing Hugoton Production Company;

W. P. Wesley, representing Columbian Fuel Corporation; and

Charles Lindberg, representing Mobil Oil Company, a division of Socony-Mobil Oil Company, Inc.

2. That G.S. 1949, 55,703, as amended, imposes the following duty on this Commission:

"The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *"

3. That for the purpose of facilitating such regulation, and thereby accomplishing the duty contemplated by the statute, it is necessary that the Commission promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which they are connected.

4. That the Commission's staff and other parties have submitted proposals at the hearings, and subsequent thereto, which have been considered by the Commission.

5. That Exhibit "A", designated as Rule 82-2-219, meets the mandate of the statute and will enable the Commission to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected; and that the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas should be amended by adopting the proposed Rule as contained in Exhibit "A", and that said proposal should be designated Rule 82-2-219.

6. That Rule 82-2-219 is of statewide application and should therefore be filed with the Revisor of Statutes on February 8, 1960. This order and Rule 82-2-219, which is attached hereto as Exhibit "A" and made a part hereof, should be served upon all parties affected by this rule by first class United States mail. Further notice should be given by publishing this order including Rule 82-2-219 in the official state paper, on February 8, 1960, and this rule shall become effective on February 8, 1960.

It Is, Therefore, by the Commission Ordered: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960.

And It Is Further Ordered: That this order and said rule, duly certified, be served upon all parties to be affected by first class United States mail and that further notice be given by publishing this order including Rule 82-2-219 in the Official State Paper, on February 8, 1960.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such

further order or orders, and promulgating and implementing such further rules and regulations as from time to time it may deem proper."

By the Commission It Is So Ordered.

Wiles, Chm.; Beatty, Com.; Byrd, Com

EXHIBIT "A".

Rule 82-2-219

RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY.

In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959, Supp. 55-703; Effective February 8, 1960).

APPENDIX G

Pertinent Portions of the Natural Gas Act

Sec. 1 NECESSITY FOR REGULATION OF NATURAL GAS COMPANIES.

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Sec. 4 RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES.

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the

jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change

or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus

made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Sec. 5 FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall

have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Sec. 7 CONSTRUCTION, EXTENSION, OR ABANDONMENT OF FACILITIES; CERTIFICATE OF CONVENIENCE AND NECESSITY; CONDEMNATION PROCEEDINGS.

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that

no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience

and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and

willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the lo-

cation of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Sec. 16 ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS.

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and

regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

APPENDIX H

Federal Power Commission Regulations under Natural Gas Act

Filing by producers and gatherers of natural gas which are also natural gas companies

154.91 APPLICABILITY.

(a) *Definitions.* (1) An "independent producer" as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

* * *

(b) *Filings by operators signatory to a gas sales contract.* (1) Where the operator (i) of a natural gas producing property (not a producer selling pursuant to a percentage formula under paragraph (e) of this section), or (ii) of a plant processing natural gas and located in or near the production area of the gas it processes is a signatory party to a contract for the sale of the gas produced or processed, the operator shall make all the filings required under §§ 154.92 (rate schedules), 154.94 (changes in rate schedules), or 157.23 (applications for certificates) of all signatories for such sale, as well as for the sale and delivery (according to the terms of the contract) of the gas of non-signatory coowners. Notwithstanding this requirement for filings by operators, a coowner who is a signatory party to a contract of sale of natural gas may, but he need not, make his own filings under §§ 154.92,

154.94 and 157.23 in addition to the filings required of the operators.

(2) As a part of his application for a certificate of public convenience and necessity, the operator shall file: (i) a copy of the contract or contracts for the sale of gas in interstate commerce for resale; (ii) the names and percentum of ownership of coowners whose interest in production is to be delivered to the purchaser under the terms of such contract or contracts; and (iii) a copy of the sales authorization from, or operating agreement with, any nonsignatory coowners whose gas is so to be delivered.

(3) The operator, either at the close of each calendar year or at the end of each 12-month period following the date of initial filing, shall submit a statement listing any changes in the ownership of working interests, producers, or plant ownership occurring subsequent to the filing of a prior statement hereunder.

154.92 FILING OF RATE SCHEDULES BY INDEPENDENT PRODUCER.

(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an

interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

* * *

154.93 RATE SCHEDULE DEFINED.

For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

Provided, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions

shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) Provisions that change a price to a specific amount at a definite date; and

(3) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (subparagraph (2) of this paragraph), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question.

154.94 CHANGES IN RATE SCHEDULES.

(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this section.

* * *

154.97 CANCELLATION OR TERMINATION.

When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place,

the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of parties to whom the notice has been mailed.

157.5 PURPOSE AND INTENT OF RULES.

(a) Applications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested. Some applications may relate to facilities which are additions to existing facilities or facilities of such character that an abbreviated application may be justified under the provisions of § 157.7. However, every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project as well as its effect upon applicant's present and future operations.

(b) Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.

(c) This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant.

157.23 APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY INDEPENDENT PRODUCER.

* * *

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 7 copies) pursuant to sections 157.24 through 157.27. The Commission reserves the right to request additional copies. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by Exhibit A. Where the economic feasibility of a new pipe line or important extension or expansion of an existing pipe line depends upon proof of an adequate gas supply, all related applications necessary to effectuate the service shall be filed within time to enable the Commission to consider all related matters concurrently.

157.30 ABANDONMENT OF SERVICE.

No independent producer as herein defined shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the

available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. *Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas.